Discovering the Best Method of Judicial Selection

How Should State Supreme Court Justices be Placed onto the Bench?

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Undergraduate Honors Thesis

Thesis Defense Date: October 28, 2022

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Abstract

As the American Judiciary becomes a more active vehicle for progressing policy and partisanship, this paper examines what method of judicial selection we ought to prefer. That is, how we should prefer that state supreme court justices get to the bench. To answer this question, I first analyze the empirical data surrounding each of the four main and general selection methods used across states today (partisan elections, nonpartisan elections, merit selection, and appointment) and identify what general trends exist. Once these trends have been established, I then move into a philosophical discussion that asks what trends we ought to prefer in a given selection method, and what traits we ought to avoid. The question ends up being one of whether we should advocate for an independent judiciary, or one accountable to public opinion. I advocate for the former and the most independent selection method: merit selection.

1 Introduction

As the American Judiciary becomes a more active vehicle for progressing policy and partisanship, people are beginning to take a new-founded interest in the judicial processes of the United States. One of the big two-fold questions that constantly gets floated around is: who are these justices and how did they get onto the bench? From this people begin to ask: granted that these justices are making such influential decisions, do we want them to be hidden from the public eye, or should they be held accountable to it? I seek to answer this latter question at the state level, and deliver a prescription with regards to what method of judicial selection we ought to prefer in today's America.

Judicial selection is the process by which judges are placed onto the bench in their state's supreme court. Judicial selection methods vary across states, but they tend to follow one of four main structures: partisan elections, nonpartisan elections, merit selection, or appointment. In partisan elections, judicial candidates have designated party affiliations and run-in general elections which typically come with primaries prior to the general election. The 6 states that use partisan elections include: AL, IL, LA, NC, PA, and TX. Nonpartisan elections function in a similar fashion but the candidates do not have a designated party affiliation. The 15 states that use this method are: AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, and WV. Appointments are typically done through gubernatorial appointment where a governor chooses a judge, though a couple states use legislative appointment where the legislature votes on a judge. For our purposes, both forms of appointment will be lumped into a single category. When lumping these two categories together, the 12 states that use appointment are: CT, DE, HI, MA, ME, NH, NJ, NY, RI, SC, VA, and VT. In all three of these selection methods, the retention method generally matches the way the judge was put onto the bench for their first term, meaning

elected judges stand for reelection and appointed judges stand for reappointment. In merit selection, judges are first put onto the bench by either a nonpartisan committee that selects the judge or a governor who chooses from a list of potential judges compiled by a nonpartisan committee. Merit selected judges are typically retained through yes-or-no retention elections in which voters are given a ballot that roughly asks, "shall judge *x* be retained?" with the options for response being a form of "yes-or-no". It is generally rare for a judge to lose a yes-or-no style retention election. The 17 states that use merit selection include: AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, and WY.

In this paper I am going to argue that merit selection is the best method of judicial selection for state courts in the current American system. That is to say, I will present the case for why in today's political landscape we should prefer that state judges get to the bench by means of merit selection rather than appointments or elections. My inquiry will not concern what the best method of judicial selection would be given a set of hypothetical circumstances different from those that exist today. Instead, I am aiming to make a prescription that would be delivered if someone asked me at this moment: given the current state of politics and U.S. institutions, if you had to choose a single method of judicial selection to be used going forward across various states courts, which method would you choose?

To reach this argument, I will begin by surveying recent empirical data surrounding judicial selection and the different methods of selection. I will find what trends exist between the different selection methods with regards to five main criteria: productivity (how much work a judge accomplishes in a given amount of time), quality (how good is the work these judges are producing), independence (how much of a role do strategic considerations and irrelevant influences play on a judge deciding a given case), perceptions of legitimacy (what selection

methods do the people find more or less legitimate), and diversity (does any selection method favor or disfavor minority judges more than another). The empirics will give us confident results in terms of independence, perceptions of legitimacy, and diversity, to show that merit selection produces the most independent judges, perceptions of legitimacy suffer when judicial selection becomes too political, and no method particularly advantages or disadvantages minorities. Some issues will arise with the indicators of productivity and quality that prevent us from reaching confident conclusions about them and using them for extrapolation into a larger philosophical discussion.

Once these empirical trends are established, I will turn to a philosophical discussion that attaches normative judgements to these trends and argues that we ought to prefer an independent judiciary because it is the most likely to deliver us optimal outcomes and a healthy democracy. The former claim will rely on the idea that though there may be a truly right answer in a given case, there is a wide range of cases in which the right answer is either ambiguous or we are unable to track down the right answer. Thus, in such cases (which make up the bulk of the cases that supreme court justices deal with) we must rely on appealing to the decision-making processes that were used to form an opinion to indicate whether a judge is giving his most earnest efforts to uncover the right decision. This is to say that when rightness is tough to pin down (as it is for just about every case that hits a state supreme court justice's desk), all we can rely on is the most sound and rational line of reasoning. Such a decision-making process will be an independent one guided by rationality and free from strategic considerations. The latter claim about a healthy democracy will rely on the idea that to be truly democratic, a nation must account for the potential issues that can arise with pure majoritarianism and have an institution free from majoritarian influence where the minority can make his case on a level playing field. I

will also mention that though elections can have some beneficial effect on democracy in terms of legitimacy, their politically charged nature tends to decrease aggregate legitimacy. From this I will conclude that the best method of judicial selection is merit selection because it is the most independent and least political one.

2 Some Groundwork

In order to determine the best selection method, we must first designate what is meant by "the best". The operational definition of "the best method" will be the one that gives us optimal outcomes and promotes a healthy democracy. Of course, neither of these terms comes with a clear-cut definition that people agree upon. And so, we are certainly due for a philosophical discussion on what the operational definitions of these terms are in due time. However, operationally defining these terms in the context of our empirical indicators makes for a much more applicable and informed conversation. This will serve our overall discussion and help us form conclusions much better than trying to dance around the subject right now with nothing to go from. In the meanwhile though, hold on to a very general conception of an optimal outcome as a *right* decision (whatever that may look like for you), and a very general conception of a healthy democracy as one that has a strong commitment to *democratic values* (again, whatever that may look like for you).

The empirical criteria used to inform our philosophical discussion will pull from some of the five main and broad categories previously mentioned: productivity, quality, independence, perceptions of legitimacy, and diversity. Our ambition in the empirical research section is to find out how the selection methods fare relative to each other in terms of these criteria. I hesitate to say that we are looking for a selection method's strengths and weaknesses (in the empirics section itself) because that is a subjective question which we are aiming to answer in our

philosophical discussion. Thus, the empirics are going to be presented from a more positive than normative standpoint. To demonstrate the importance of and reasoning for this, consider something within a category like independence from public opinion. In the empirics section we would say something more along the lines of "the judges of selection method *x* cater more to the opinions of the public than the judges of selection method *y*" rather than something like "selection method *x* performs better or worse than selection method *y* with regards to influence from public opinion". The reason for this is that conformity to public opinion can be a good thing if our conception of a healthy democracy is one that values citizen input on every facet of decision making. However, it can also be a bad thing if our conception of a healthy democracy is one that prioritizes adequate judicial checks against a potential tyranny of the majority. This will be the subject of our philosophical discussion and the reason for a more positive presentation of the empirics.

The important thing is that before we enter the philosophical discussion we want to be able to tell an empirically positive story about the selection methods. That is, we want to synthesize our results in a very holistic manner so that we can pick out trends and see if there exists enough detail to form a spectrum of performance with regards to both singular categories and hopefully the sum of all categories. A large reason for this is to test the empirics against the current narratives that surround the question of choosing a judicial selection method. It has commonly been said that the question of choosing a judicial selection method is a question of choosing how much you value judicial independence versus judicial accountability on a zero-sum scale, with the former belonging to appointments and the latter to elections. This is the primary narrative that surrounds the question of judicial selection today and it is typically promulgated by means of anecdotal evidence. However, we are seeking to survey the current

landscape of judicial selection through empirics so as to test whether there is any truth to these narratives. It is important to remember that the empirics themselves won't reveal a clear winner to us, but we are likely to end up with a useful zero-sum scale of sorts from them. Once the actual nature of this scale is revealed to us, I will philosophically argue for why we should prefer a specified and given point on that scale.

3 The Empirics

To follow is a presentation of the empirics that takes stock of how the different selection methods perform relative to each other according to the five main categories (productivity, quality, independence, perceptions of legitimacy, and diversity) and the respective indicators that comprise these overall categories.

3.1 Productivity

With regards to productivity, the criteria was simply the average number of opinions a judge writes in a given amount of time. Stephen Choi and peers find that on average, appointed judges write the least amount of opinions, partisan elected judges the most, and merit selected and nonpartisan elected judges landed roughly together in between these two poles.[1] Choi and peers offer the explanation that judges subject to electoral pressures are more productive because they perceive churning out decisions as a signal to intermediaries (such as newspaper editorialists, bar associations, and parties) that they are both being productive and have judicial competence.[2] These intermediaries relay such information and attitudes to the public. To bolster this theory,

[1] Stephen J. Choi, Mitu G. Gulati, and Eric A. Posner. "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," *Journal of Law, Economics, & Organization* 26, no. 2 (2010): 309. http://www.jstor.org/stable/40925601.

[2] Ibid., p. 312.

Choi and peers point out that productivity declines as retirement approaches for elected judges; meaning once electoral competitiveness leaves the picture, productivity dips.[3]

3.2 Quality

With regards to quality, quality of opinions and perceived quality according to lawyers were used as the main criteria.

3.2.1 Opinions

To determine the quality of opinions, Choi and peers use the average number of outside citations a justice's[4] opinion receives on average as their indicator. By outside citations is meant citations that come from outside the jurisdiction of where the decision was established (other state courts, federal court usage in other cases, etc.). The primary motivation for this is to quantify instances where opinions are cited "because they are helpful, not because they have precedential force".[5] Choi and peers find that appointed judges receive the most outside citations and partisan elected judges the least, with no significant results produced for merit selected and nonpartisan elected judges. Once again, Choi and peers point towards partisan pressures as their best explanation. As opposed to quantity, quality is not observable to the public. Thus, elected judges are more incentivized to churn out decisions than they are to write opinions of the highest quality.[6] Appointed judges on the other hand have less pressure to produce and can use more time to write more astounding opinions that can be used to advance their career.[7] Choi and peers also tease out another potential explanation that perhaps judges who are more skilled at being active politicians

[3] Ibid., p. 312-313.
[4] Throughout the paper I will use the terms judge and justice interchangeably.
[5] Ibid., p. 300.
[6] Ibid., p. 317.
[7] Ibid., p. 317.

are also those who are less skilled at writing quality opinions; but they do not dive much further into this idea beyond simply mentioning it.[8]

3.2.2 Lawyer Surveys

In my search for empirical data concerned with the quality of judicial selection methods, I found that many sources were using surveys to form the basis for their quality indicator. More specifically, surveys that asked lawyers to rank the quality of different legal systems, then sorting the results by selection method. Russell Sobel and Joshua Hall use a survey of this exact type conducted by the U.S. Chamber of Commerce that asks 1,000 lawyers to evaluate the legal systems of states that they are familiar with on various criteria such as "judicial impartiality, judicial competence, and overall treatment of tort and contract litigation".[9] Certainly, this survey dips into some of our other categories, but I think it forms a holistic and neat way for us to interpret quality. The survey indicates that the average ranking (out of 50 with 1 being the best and 50 the worst) is 21.1 for states that appoint / use merit selected judges (Sobel and Hall lump the two in together as a single selection method)[10], 26.4 for states that host nonpartisan elections, and 39.9 for states that host partisan elections.[11] Sobel and Hall run various regressions on this data and find that holding other factors equal, "a state moving from an elected system to an appointive system [appointive referring to both gubernatorial appointment and merit selection

[8] Ibid., p. 317.

[9] Russell S. Sobel, and Joshua C. Hall. 2007. "The Effects of Judicial Selection Process on Judicial Quality: The Role of Partisan Politics." *Cato Journal* 27 (1): 73. https://discovery.ebsco.com/linkprocessor/plink?id=af6cf6ce-b67a-3ce1-b84c-6ef697799aa6.

[10] Sobel and Hall, like some other authors that will be cited, lump appointment and merit selection in together as a single selection method. An explanation of their reasoning for this and some concerns about this approach will be expressed later in the paper.

[11] Ibid., p. 73-74.

lumped into a single category]… could expect an increase in their ranking on the U.S. Chamber of Commerce's index by around 4.5 points".[12]

3.3 Independence

With regards to independence, I broke things down into three main subcategories of independence from: government pressures (how often justices align with the preferences of government litigants), public opinion pressures (how often justices align with the preferences of public opinion), and business/funding pressures (how often justices align with the preferences of their funders). The general consensus across the empirics is that at the beginning of their term, judges are partial to those who they relied on for their initial selection. As their term goes on, justices then become more partial to those who they rely on for retention.

3.3.1 Government Pressures

Justices selected by appointment and partisan elections are more likely to vote for government litigants—the former more so than the latter—and merit selected judges are the least likely to rule in favor of government litigants, with nonpartisan elected justices being only slightly more likely to do so, though way behind the likes of partisan elected judges.[13] Obviously, government appointed judges depend on a happy government more than anyone else, followed by partisan elected justices who also rely on having the support of a happy government, but in a more indirect campaign and rhetorical support capacity. At the very bottom of this government partiality list are merit selected judges who care the least about government forces, since their retention relies more on either simple retention elections or merit committee (typically of

[12] Ibid., p. 75.

[13] Joanna M. Shepherd. "Are Appointed Judges Strategic Too." *Duke Law Journal* 58, no. 7 (April 1, 2009): 1617. https://discovery.ebsco.com/linkprocessor/plink?id=dd788d9d-9c56-305a-a4c4-d3f3518d7301.

nonpartisan fashion) decisions. Slightly more partial than merit justices are the nonpartisan elected judges who (if they truly live up their nonpartisan title) care little about satisfying government litigants because their losses with one political party are gains from another one. Hypothetically, this should make these judges even out towards the middle of the partisan spectrum. One might suspect that we can easily explain away all of these results by suggesting that they are mere indicators of a judge's philosophy happening to align with the opinions of their appointing forces. However, Joanna Shepherd shows that for every year that an appointed judge gets closer to retention, that judge becomes less and less likely to overturn a state statute.[14] Thus, similar to Choi and peers' analysis of productivity we see that as reappointment pressures increase, so too do these trends of government partiality.

3.3.2 Popular Opinion

The question of independence from popular opinion demonstrates a very similar trend. In her analysis of states that are generally pro-death penalty and host judicial elections, Melinda Hall finds that "District-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases".[15] Jason Czarnezki builds off this literature and finds that in Wisconsin, as judges become more exposed to electoral politics they become "less likely to protect defendant and prisoner rights" as opposed to the behaviors they exhibit after entering office through a gubernatorial appointment.[16] This

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[14] Ibid., p. 1623.

[15] Melinda G. Hall. "Electoral Politics and Strategic Voting in State Supreme Courts." *The Journal of Politics* 54, no. 2 (May 1, 1992): 442. https://discovery.ebsco.com/linkprocessor/plink?id=6eda9d31-b889-39c6-8f46-b7cbe1607f85.

[16] Jason J. Czarnezki. "A Call for Change: Improving Judicial Selection Methods." *Marquette Law Review* 89, no. 1 (January 1, 2005): 174. https://discovery.ebsco.com/linkprocessor/plink?id=ebf061ca-6b58-37fa-aa2f-5f22c7c720ba.

builds on a hypothesis that non-"tough on crime" judges fare poorly in judicial elections. As Czarnezki's findings suggests, judges are well aware of this and act strategically. In another piece of hers (one that lumps together appointment and merit selection systems), Shepherd finds that these trends apply writ large. As we already know, conservative government retention means greater conservative decision making for a judge regardless of whether the judge is conservative or liberal. However, Shepherd finds that the effect of partisan electoral retention forces on a judge's behavior are much more pronounced than the effects of government retention. That is, judges carter far more towards conservative litigants when their retention depends on a conservative electoral body as opposed to a conservative government force.[17] Shepherd also finds that these trends are significantly weaker for judges who face retention through nonpartisan elections and retention elections.[18] Again, to test against the hypothesis that this all may be explained away by partisan people picking partisan people, Shepherd shows that when retention pressures fade—whether it be by dint of lifetime tenure or a final term—these trends fade with them.[19]

3.3.3 Business/Funding Pressures

In his analysis of arbitration law in Alabama, Stephen Ware found that strong correlations exist between a judge's decision on arbitration cases and their sources of campaign funds. Ware states that he expected to find such correlations for the big and controversial cases. However, he was shocked to find that such trends make their way into "ordinary, run-of-the-mill, routine cases"

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[17] Joanna M. Shepherd. "The Influence of Retention Politics on Judges' Voting." *Journal of Legal Studies* 38, no. 1 (January 1, 2009): 188-190. https://discovery.ebsco.com/linkprocessor/plink?id=4e1f6482-6fe4-3843-93a6-12baf02f239d.

[18] Ibid., p. 189.

[19] Ibid., p. 192-193.

like ones pertaining to "contract formation, interpretation and waiver".[20] A contracts teacher himself, Ware stated that he had thought such cases were neutral and sufficiently bland in nature such that there was no room for interpretations outside a basic formal procedure.[21] However, this is far from the case and rather than correlations breaking down at this level of cases, they actually got reinforced. In their groundbreaking work, Michael Kang and Joanna Shepherd use a data set consisting of every state supreme court case over a four-year period to determine the relationship between judicial decision making and campaign contributions. Their work essentially validates Ware's findings on a mass scale. Kang and Shepherd find that for every $1000 a business group contributes to a judge's election campaign, the probability that a partisan elected judge votes in favor of a business litigant for a labor, contract, or torts case increases by 0.03%, meaning "a $1,000,000 contribution would increase the average probability that a judge would vote for a business litigant in any case by 30%".[22] Nonpartisan elected judges however are far less impacted by money and were only influenced with regards to labor cases.[23] A similar check to the ones we've seen before, Kang and Shepherd take a look at how judges behave when retention approaches to test whether these partisan judges just so happen to be pro-business people, or if the money is actually altering their behavior and causing them to act strategically. The results show that as retention approaches, judges who face partisan reelection become more likely to vote in favor of business litigants, while nonpartisan elected judges become less likely

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[20] Stephen J. Ware. "Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama." *Capital University Law Review* 30, no. 3 (January 1, 2002): 628. https://discovery.ebsco.com/linkprocessor/plink?id=78776957-14e2-32ee-a5d6-0af5f48d44f3.

[21] Ibid., p. 628.

[22] Kang, Michael S., and Joanna M. Shepherd. "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions." *New York University Law Review* 86, no. 1 (April 1, 2011): 99, 113. https://discovery.ebsco.com/linkprocessor/plink?id=3f00a590-7acb-3ad9-abc3-6ac7a1ea8cff.

[23] Ibid., p. 113.

to vote for business litigants.[24] This maps onto an earlier mentioned theory that nonpartisan judges' losses on one side of the aisle are their gains on the other side, and so they have more room to act freely while the partisan judges are forced to pander to a single side and thus act strategically.

3.4 Perceptions of Legitimacy

The empirical literature that discusses the institutional legitimacy of state courts and public perceptions of them is dominated by James Gibson. The Gibson approach to measuring perceptions of legitimacy is typically to use experimental vignettes and surveys (representative ones) and play with other factors (holding certain variables constant, adjusting for certain other variables, looking for variables that offer potential alternative explanations, etc.) through empirical analysis to draw conclusions. In essence, Gibson takes representative surveys and scrutinizes them to account for other potential factors, and conducts his own vignette experiments for additional survey data. Gibson's many works on the subject follow a trend of revealing something and then countering that something in the next project. The general consensus of Gibson's work though is that elections can boost perceptions of the judiciary and bolster legitimacy by making the process seem more transparent and democratic[25], but these good effects can be outweighed by the decreases in legitimacy that come when the politics get too nasty[26]. In fact, things don't even have to always get rhetorically visceral. Sometimes, the

[24] Ibid., p. 116-117.

[25] James L. Gibson, Jeffrey A. Gottfried, Michael X. Delli Carpini, and Kathleen Hall Jamieson. "The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment." *Political Research Quarterly* 64, no. 3 (September 1, 2011): 545–58. https://discovery.ebsco.com/linkprocessor/plink?id=dce6c165-d9f7-3cf9-8832-35fb55daf5dc

[26] James L. Gibson. "'New-Style' Judicial Campaigns and the Legitimacy of [US] State High Courts." *Journal of Politics* 71, no. 4 (October 1, 2009): 1285–1304. https://discovery.ebsco.com/linkprocessor/plink?id=eab4b14d-b9c9-3094-986e-5c1790a99123.

mere presence of campaign ads and campaign contributions can be all it takes to turn things sour.[27] In more recent work, Benjamin Woodson confirms Gibson's theories by showing that when judicial elections are less active, they achieve more legitimacy than appointed courts.[28] However, as judicial elections become more active, legitimacy sours to a point where appointed courts have more institutional legitimacy.[29] The reasoning for this is that as election activity increases, people begin to think of their judges as more political actors than independent beacons of justice. A large part of this is not just political rhetoric, but the influence of funding that people worry creates judges for hire. Thus, a perceived loss of independence drives much of this decrease in legitimacy.

3.5 Diversity

There are two common and opposing narratives surrounding diversity and judicial selection. The first is that merit selection and appointments are better at encouraging selections from a diverse set of racial, ethnic, and gender backgrounds while elections are the least likely to promote diversity. As the argument goes: elections require access to large amounts of money and minorities in the U.S. are systematically more likely to have less access to such.[30] The second and opposing narrative is that merit selection actually hurts minority representation because it

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[27] James L. Gibson. "Challenges to the Impartiality of [US] State Supreme Courts: Legitimacy Theory and 'New-Style' Judicial Campaigns." *American Political Science Review* 102, no. 1 (February 1, 2008): 59–75. https://discovery.ebsco.com/linkprocessor/plink?id=8a084a65-8c4d-377b-b3c3-3b6a558a34cb.

[28] Benjamin Woodson. "The Two Opposing Effects of Judicial Elections on Legitimacy Perceptions." *State Politics & Policy Quarterly* 17, no. 1 (March 1, 2017): 37. https://discovery.ebsco.com/linkprocessor/plink?id=385f67f2-33b9-34b6-8952-2719bbbc62fb.

[29] Ibid., p. 37.

[30] David E. Pozen. "The Irony of Judicial Elections." *Columbia Law Review* 108, no. 2 (March 1, 2008): 304. https://discovery.ebsco.com/linkprocessor/plink?id=c617f9bd-2a1f-3e7d-9155-add4881e33db.

aims to uphold the status quo and "traditional" image of what the judiciary looks like.[31] The general empirical consensus is that in recent times, neither of these two narratives are accurate.[32] Many empirical researchers converge on this conclusion, however Mark Hurwitz and Drew Lanier run one of the few multivariate analyses that confirms it. The pair find that no selection method favors or disfavors minorities significantly more than another.[33] Though diversity in the judiciary is a complicated issue and there are still many improvements to be made in terms of getting more minorities on the bench and resolving current disparities, Hurwitz and Lanier conclude that women as well as racial and ethnic minorities are making both absolute and relative gains, and it would be a mistake to look towards judicial selection methods as a primary explanation of how judicial diversity operates.[34]

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[31] Mark S. Hurwitz, and Drew Noble Lanier. "Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years." *Justice System Journal* 29, no. 1 (January 1, 2008): 49. https://discovery.ebsco.com/linkprocessor/plink?id=265adf33-8f6d-3fcc-8e17-6fbc569f6d9a.

[32] Hurwitz and Lanier find some truth to the claim that merit selection historically had a preference for judges who fit the "traditional" judge image. However, they find that the matter is too complicated to be assured that merit selection is the chief culprit when it comes to facilitating these preferences. Either way, the duo conclude that such claims are not representative of merit selection in modern times. See Mark S. Hurwitz, and Drew Noble Lanier. "Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years." *Justice System Journal* 29, no. 1 (January 1, 2008): 47-70. https://discovery.ebsco.com/linkprocessor/plink?id=265adf33-8f6d-3fcc-8e17-6fbc569f6d9a; see also Mark S. Hurwitz, and Drew Noble Lanier. "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts." *State Politics & Policy Quarterly* 3, no. 4 (December 1, 2003): 329–52. https://discovery.ebsco.com/linkprocessor/plink?id=fbcaac5e-d918-33dd-8136-c17f1f4e662b.

[33] Mark S. Hurwitz, and Drew Noble Lanier. "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts." *State Politics & Policy Quarterly* 3, no. 4 (December 1, 2003): 337–346. https://discovery.ebsco.com/linkprocessor/plink?id=fbcaac5e-d918-33dd-8136-c17f1f4e662b.

[34] Ibid., p. 345-346.; for a discussion on the factors that formerly explained demographic variations between state supreme courts (the impact of region on religious affiliations of judges, the impact of locality rather than educational background, etc.), see Craig F. Emmert, and Henry R. Glick. "The Selection of State Supreme Court Justices." *American Politics Research* 16, no. 4 (October 1, 1988): 452–459. doi:10.1177/004478088016004003.

4 Issues with the Empirical Data

At this point I would like to turn to a discussion on some of the issues that bar us from accepting some of these results (at least as they are presented to us) and prevent us from forming general conclusions based on them. Some of the empirics do tell a clear picture, and because of this we can form some generalizations that we are confident about. However, before getting to this we first have to root out some of the problematic categories. The primary concerns are that our indicators for productivity and quality are incomplete/insufficient, and that the selection methods may not have clear enough lines to distinguish some from others.

4.1 Productivity

Given the plethora of potential indicators that could be used, different data can be called upon to tell a potentially different story. David Vladeck criticizes Choi and peers as taking for granted the idea that writing more opinions in a given amount of time is a good measure of productivity. A GVR order (grant, vacate, and remand) is a process whereby a higher court sends a case back to a lower court for consideration in light of a recent ruling. Vladeck points out that some high courts prefer to let a case mature and solve multiple cases under the umbrella of a single one so they can form a more encompassing single opinion and then utilize a GVR order.[35] As high courts utilize GVR orders more, are we to penalize them because they simplified the process and did not undertake a new case where one was not necessary? If judges are managing to solve many cases under the umbrella of a single case that gives us a more broadly applicable and guiding decision, it seems like we ought to account for this in our data rather than disregard it

[35] David C. Vladeck. "Keeping Score: The Utility of Empirical Measurements in Judicial Selection." *Florida State University Law Review* 32, no. 4 (June 15, 2005): 1437. https://discovery.ebsco.com/linkprocessor/plink?id=2686c4e9-10bf-3854-9820-3f9da2b4e861.

and automatically think that more equals better.[36] Suppose we have two judges, Judge A and Judge B, and five very similar cases. Judge A handles the five very similar cases with five different opinions. Judge B handles the five very similar cases with a single ruling for one of the cases and a GVR order of the other four. Who is the more productive judge to you? Judge B seems like the winner to me because he has given a ruling that can be applied to multiple cases in the future and has freed up the room to hear four more cases that he would not have been able to hear otherwise. In the case of Judge A and Judge B we would clearly be led astray by looking purely at absolute numbers and thinking that more always equals better. The argument can thus be made that GVR orders are an important indicator which must be taken into account rather than simply defining productivity as just the sheer number of decisions made.[37]

4.2 Quality

Concerning quality, Vladeck also casts doubt on whether we can rely on Choi and peers' usage of outside citations to be the chief indicator for opinion quality. For starters, Vladeck worries that we may be mistaking a deep analysis for a convenient one.[38] That is, rather than cases being cited frequently because they so elegantly analyze the complexities of a case and give it all its proper due, it may just be that the opinion is cited often because it is rather basic and gives clear indicators of how to interpret a case, at the expense of not fully appreciating the case.[39] Furthermore, Vladeck points out that many of the cases resolved today are done so with unpublished opinions. Thus, because Choi and peers' methodology fails to account for

[36] Ibid., p. 1436-1437.
[37] Ibid., p. 1436-1437.
[38] Ibid., p. 1432.
[39] Ibid., p. 1432.

unpublished opinions, we are only being told which type of judge writes the best published opinions and we are ignoring the bulk of their work.[40]

Andrew Hanssen does not allow our U.S. Chamber of Commerce survey to slip by either. Recall that when 1000 lawyers were asked to rank state judicial systems by perceived quality and this information was sorted by selection method, merit selection systems ranked the highest. A highly critical Hanssen argues that lawyers are biasedly motivated to give such praise for merit systems because they make for more independent judges, which makes for more uncertainty of how the courts will rule, which causes more people to think they have a fighting chance with their case, which makes for more people trying their cases in court, which makes for a greater demand of lawyers needed to work on these cases, which makes for happy and benefitting lawyers.[41] Hanssen also suggests that merit plans give lawyers on specific bars the greatest opportunity to influence the makeup of their state courts.[42] In essence, Hanssen is warning that we ought to be cautious about ranking our selection methods by the opinions of lawyers because they may be guided by ulterior motives.

4.3 Drawling Lines Between the Selection Methods

Another issue that arose in conducting a survey of the empirics for judicial selection spanned across all categories. It was a question of how to define the selection methods. One instance of this issue is having to decide where the lines for gubernatorial appointment stop, and where the lines for merit selection begin. Sobel and Hall choose not to distinguish appointment systems from merit ones because as they state in a footnote: “In some states the governor can only

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[40] Ibid., p. 1434.

[41] Andrew F. Hanssen. “On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan.” *Public Choice* 110, no. 1–2 (January 1, 2002): 87-92. https://discovery.ebsco.com/linkprocessor/plink?id=2fa53733-4ad5-3662-a011-71678d51f6db.

[42] Ibid., p. 86-87.

appoint from a slate of candidates put forth by a nominating commission; however, the governor generally appoints some or all of the members of this nominating committee. For this reason, the literature generally does not make a distinction between these two alternatives".[43] Clearly though, many other authors found the distinction worth making and conducted their research in a manner that separated the two selection methods, returning results which demonstrated differences between them. Thus, the question of where to draw the lines is slightly problematic. On one hand, giving every slightly unique selection method all its due involves getting so deep into the selection processes of a single state that it would make generalizations almost impossible. However, it would be wrong to just lump both appointment and merit selection into one system of appointment since there are clear differences that show up in the empirics (when authors make the effort to draw their own lines). Thus, we fall into a strange position of generalizing from the basis of data that cares to distinguish the two and data that does not.

Another instance of this issue with drawing lines between the selection methods involves partisan and nonpartisan elections. Certainly, the empirics show a difference in results between the two. However, the bulk of this data comes from circa 2000. At the time of writing, many authors considered us to be in a time of extreme polarization. Fast forward just a few years, and the polarization of these prior times looks like a state of utopian discourse. This brings up a new issue that has yet to spawn a vast amount of empirical literature: are nonpartisan elections still so nonpartisan that these pre-2015 empirical differences stated above hold water?

5 Empirical Takeaways

5.1 What We Can and Cannot Be Confident About

[43] Sobel, and Hall. "The Effects of Judicial Selection Process on Judicial Quality", 69-70.

The categories which we can be confident about are independence, perceptions of legitimacy, and diversity. There is general consensus surrounding all three of these categories and the empirics within them come with enough distinction between the selection methods to make claims about all four selection methods in their own right. With regards to the latter part of that sentence, this is to say that there are enough sources which draw the line between merit selection and appointment so that we can discuss the two as separate selection methods. We may have to forego the input of lawyers on the subject of independence, but the rest of our sources offer strong and generally agreed upon conclusions. As to the concern surrounding nonpartisan elections blending into partisan ones, we are going to table that discussion and raise it in the philosophical section. The conclusions derived concerning perceptions of legitimacy may seem a little shaky given that I said Gibson leads the charge and likes to work against his former papers. However, the general conclusion he and more recent scholars like Woodson seem to reach is a very modest one that we can hang our hats on: when elections are clean, they can increase judicial legitimacy, but when they get dirty, aggregate judicial legitimacy suffers. This is a sentiment generally agreed upon by the current empirics. In terms of diversity, this category was also pretty clear cut once the focus was turned to more recent empirics.

Moving forward I think it is in our best interest to extrapolate from the empirics that demonstrate confident differences between selection methods (independence and perceptions of legitimacy), and put aside the ones that we are less than sure about (quality and productivity). I should emphasize that we will focus on confident differences because though diversity returned confident results, the results showed that there are no significant differences between selection methods and it is thus not a point we have to consider in trying to separate better methods from the more inferior ones. With regards to why I am setting aside the categories of productivity and

quality, it is because I believe that the empirics surrounding these categories are too narrowly focused as it currently stands. Vladeck expresses a generally similar argument in suggesting that he appreciates the work of judicial selection empiricists, but thinks that the work being done right now serves the greater purpose of setting up more thorough and holistic future empirics.[44]

The nature of independence and perceptions on legitimacy however rely on more simple and straightforward indicators. Of course, these categories come with their own respective issues, but we are able to make more reasonable jumps from them because of the clarity we have regarding the initial data. If we try to extrapolate from the categories of quality and productivity, we are making leaps from essentially incomplete data sets. It just happens to be that independence and perceptions of legitimacy lend themselves better to us because their indicators are much simpler and easier to pin down. In trying to find what people think about the judiciary, we simply ask them. In trying to find out what independence actually looks like, we look at correlations concerning behavior that conforms to certain forces more than others as well as how this behavior changes when the power of such forces get removed (i.e. a candidate has no more terms to run or has lifetime tenure). There is less potential to be guided by a narrative rather than the data when the indicators are more straightforward and require less interpretation.

This is not to say however, that independence and perceptions of legitimacy have little to offer or have uninteresting conclusions. On the contrary, these categories are blossoming with subcategories concerning independence from: governmental forces, popular (citizen/electoral) forces, and business/funding forces. What's more, the checks on these correlations that we use to make claims about causation are more clear because of our simple indicators. All we have to ask is how selection method *x*'s judges behave when the forces before them are of the same or

[44] Vladeck. "Keeping Score", 1441-1442.

opposite party, or when they are approaching the end of a term. Quality offers no similar set of checks and productivity only offers the latter within the narrow scope of an incomplete indicator.

5.2 A Summary of the Empirical Trends

And so, our question of judicial selection comes down to the subject of independence and perceptions of legitimacy. Regarding trends concerning independence, we did indeed reveal that there is a zero-sum-esque tradeoff scale concerning independence and accountability between the selection methods, though we only have an ideal scale if we exclude appointments. Rather than the spectrum going from appointments (independence) to partisan elections (accountability) as the common narrative suggests, we instead found that the scale goes from merit (independence) to partisan elections (accountability), with nonpartisan elections in between. Appointments don't fit in nicely because they demonstrate neither independence nor accountability. They are simultaneously isolated from public opinion (though to a lesser degree than merit judges) and partial to the forces of government. Elected judges on the other hand are partial to public opinion but provide accountability, and merit selected judges are impartial but unaccountable to the popular will. Regarding trends concerning perceptions of legitimacy, we see that elections can increase legitimacy, but if the process gets too political then the costs of such can outweigh those benefits. These two main empirical trends will inform our philosophical discussion. We will now begin to have the philosophical discussion and attach normative judgements to the observed trends in order to find out what it is we want in the judiciary and what it is that we don't. As we do so, we will uncover the strengths and weaknesses of the selection methods and be able to sort the better selection methods out from the weaker ones (according to our decided standards). We will now turn to this discussion.

6 Turning to the Philosophical Discussion

6.1 Where We Currently Stand

And so, we are now tasked with attaching normativity to our scale. To reiterate where we currently stand, we have a zero-sum-esque spectrum that has independence on one pole and popular accountability at the other. Merit selected judges belong on the former pole and partisan elected judges on the latter, with nonpartisan elected judges in the middle. Appointed judges do not fit onto this spectrum and are in their own category of no independence and no popular accountability. Our goal is to now make this scale a normative one and decide what point on the spectrum we should prefer our method of judicial selection to come from; i.e. do we care more about independence or popular accountability, something in between, or neither?

6.2 Appointments as the Worst Method

I will make things simpler by eliminating the "neither" option and appointments with it. Regarding the former, popular accountability and resistance from tyranny of the majority are clearly two guiding principles of the American system. If someone wishes to argue against this, or argue that this should not be the case, they would be pretty hard pressed to find justification. The best way of salvaging appointments in their current form is to rely on claims of hidden accountability and independence to argue that appointed judges are actually accountable ones. That is to say, there are overlooked ways in which appointed judges are actually more accountable and independent than we realize. The simple argument for this is that appointed judges rely on partisan forces in government which are held directly accountable to the public, meaning appointed judges are accountable to public opinion but in an indirect and second removed fashion that allows them some level of simultaneous independence and accountability. This argument fails for many reasons. However, the strongest one for me suggests that with all

the good also comes the bad; that appointed judges are also indirectly tied to all the not-so-great things about partisan forces in government. If the appointment advocate is going to rely on indirect political ties for accountability, they must also acknowledge indirect ties to the business interests that support these political forces. And if we're going to accept the influence of money in the judiciary, we might as well go democratic and turn to elections, for I think it would be incorrect to say that the second removed judge is made more independent from these funding ties because he is second removed. Instead, having a representative of a representative seems like it would allow for much more corruption and strategic decision making to take place, rather than genuine quests for the truth. And so, the appointment advocate does not have a solid leg to stand on and defends what I propose to be the worst method judicial selection. With that cleared up, our philosophical discussion can now center around the zero-sum-esque scale that was identified.

6.3 Preferring Independence Over Accountability

On this scale, I contend that independence is to be favored more than accountability in the judiciary itself. Thus, from best to worst (excluding appointments from our considerations)[45] our zero-sum scale gives us a proper ranking if we start from the independence pole and work our way towards accountability: merit selection, nonpartisan elections, then partisan elections. I seek to unveil my reasoning for this position by turning to a more in-depth discussion on what it means for an outcome to be optimal and what it means for a democracy to be healthy. Recall that I set our primary indicators of what makes a method of judicial selection good or bad to be

[45] Going forward in our philosophical discussion, I am going to talk about the best and worst and make relative comparisons as if appointments do not exist in our considerations, since we have already rendered them the true worst selection method and placed them out of contention. Thus, note that what we discuss the worst method in our relative comparisons, the worst method will be the worse of merit selection, nonpartisan elections, and partisan elections, but it will still be above appointment.

defined according to two criteria: how the method of selection performs in terms of giving us optimal outcomes and a healthy democracy. It was asked that we held onto a broad conception of these terms as we worked through the empirics and up to this point. Now, I seek to define the two terms in a way that demonstrates my argument for an independent judiciary as opposed to a popularly accountable one.

7 Defining an Optimal Outcome

7.1 The Difficulties of Defining an Optimal Outcome

Recall that an optimal outcome was described earlier as the *right* decision being made. Well, how do we pin down the *right* decision? Let us begin by making explicit the challenges that arise when attempting to do so. Consider a Supreme Court case[46] like Minor v. Happersett, in which the 1875 court ruled that the 14th amendment did not confer voting rights to women.[47] Clearly, the court got this case wrong. Now consider a case like Brown v. Board of Education in which the 1954 court got things right and effectively ended racial segregation.[48] In each of these cases hindsight is 20/20. We are able to consider the cases as ruled proper or improper because time has allowed us to forego the ignorance that once made these topics something of controversy.

Now furthermore, consider cases where time hasn't lent us much help in deciding what the right and wrong decision is. The prime topics that come to mind are any case concerning free speech or gun rights. Consider Brandenburg v. Ohio, where the 1969 Supreme Court

[46] Our focus in indeed on state courts; I am simply using Supreme Court cases as examples because they are more familiar and just as applicable to some of the issues that state supreme courts face.

[47] Minor v. Happersett, 88 U.S. 162 (1874). https://supreme.justia.com/cases/federal/us/88/162/.

[48] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). https://supreme.justia.com/cases/federal/us/347/483/.

"established that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite 'imminent lawless action.'".[49] Well that all sounds great, but how do you define an "imminent lawless action"? Like most Supreme Court cases regarding free speech, there is a Millian attempt to strike a balance between potential for harm and personal liberties; the problem is that no one can ever quite put their finger on a specified (yet generally applicable) set of action guiding words. In cases like these, the issue is two-fold. On one hand, new challenges and complexities within our society typically progress as fast, if not faster than our reasoning faculties. On the other hand, it also seems like it just so happens to be that there are cases in which a truly right answer does not exist, and instead we are tasked with choosing which side of a zero-sum scale to err on (if that).

And so, we see the two main issues that come with trying to pin down a *right* decision. Biases or other obstacles may prohibit the proper exercise of our rational faculties in the present and sometimes situations are too complex for us to have a reasonable grasp on the concept of rightness, even if we do have all the tools for rationality before us. Because of this, every general definition of an ideal outcome comes with a rabbit hole of questions that point out potential flaws. To emphasize the earlier point made earlier using free-speech cases, consider something like the liberty principle. Promoting individual sovereignty without sacrificing the sovereignty of another individual sounds great. However, there's clearly no consensus on where you draw the line on sacrificing the former in the name of the latter when it comes to questions about abortion, vaccine mandates, reparations and affirmative action, etc. Now one may object that this is only

[49] Walker, James L. Brandenburg v. Ohio. The Free Speech Center at Middle Tennessee State University, 2009. https://www.mtsu.edu/first-amendment/article/189/brandenburg-v-ohio.; see also Brandenburg v. Ohio, 395 U.S. 444 (1969). https://supreme.justia.com/cases/federal/us/395/444/.

for high profile cases of controversy which do not make up the bulk of the docket. However, recall Stephen Ware's findings concerning "contract formation, interpretation and waiver".[50] Campaign funding heavily influences what Ware thought were sufficiently neutral and “ordinary, run-of-the-mill, routine cases”.[51] Thus, the struggle for a right answer is not something exclusive to high profile cases. Even the rightness of such "neutral" cases is a matter of interpretation that extends far beyond mathematical decision-making and leaves room for multiple potentially right answers. And so, the definition of an optimal outcome presents itself to us as one that demands a procedural definition. Because rightness is so difficult to pin down (after all, if it wasn’t then the courts would not be needed as much as they are) all we can hope for is a set of judges who give their most integrous efforts in deciding a case.

7.2 The Definition of an Optimal Outcome

I propose that the right outcome is one produced from the strongest line of reasoning; the strongest line of reasoning being the most convincing argument made that is created in the name of seeking higher truths rather than seeking to impose biases. It is a bottom-up form of reasoning that sets out to arrive at the optimal outcome through rationality and reasoning, as opposed to the top-down methods of having a bias or presupposition and seeking ways to justify such preconceived (and potentially ill-conceived) positions. One may argue we can never perfectly achieve this bottom-up form of reasoning. To this, I agree and acknowledged earlier that even if we have all the tools of rationality available to us, we still might not be able to make the correct choice on a given issue. Undoubtedly the perfect judge who relinquishes all his biases and mathematically formulates his decisions is merely a chimera, and one that still would scratch his

[50] Ware. “Money, Politics and Judicial Decisions”, 628.
[51] Ibid., p. 628.

head on certain topics. However, we are probing to ask which selection method gets us closest to this set of reasoning so that we can get closest to the most proper decision, a perfectly reasonable ambition. For I don't think that we would want such robotic judges to exist even if that was a real possibility. Moreover, I suggest that even if you cannot be perfectly rational, you still ought to try since the perfect ought can give us a good set of guiding principles. That is to say, we may never hit the bullseye of rationality, but if we try hard enough, we are more likely to hit near it than otherwise and decide from a more solid foundation of reasoning. I should also emphasize that this does not mean the right answer can never confirm a bias. It just means that the answer was not arrived at in a top-down fashion by means of relying on a bias and seeking to confirm such a bias without any bottom-up reasoning.

8 Applying our Definition of an Optimal Outcome

8.1 Where This Definition Lands Us on the Zero-Sum-esque Scale and Some Objections

Thus, when we define optimal outcomes in a procedural fashion, we end up with an emphasis on independent decision making. This may not be explicitly clear, so allow me to briefly spell out why. If we have a judicial method of selection that forces judges to act strategically, then their decision-making processes are going to be guided by considerations which are irrelevant to the nature of whatever case is before them. Rather than considering the facts of the case and best argument, they are going to try and consider the best argument available that appeases those who they depend on for their retention. Now one may try to criticize my position by citing my earlier claim that the right answer can confirm a bias, it just can't do so without any bottom-up reasoning. Or, one might object here and suggest that published decisions are merely post hoc rationalizations of bias and that we are in no position to evaluate a judge's reasoning processes

from such decisions. While both of these claims have some merit, they are slightly misguided criticisms. We are not probing to ask how we can perfect a bad and partial judge who reasons from a bias that is rooted in strategic considerations. We are less concerned with turning the bad into the good, and more concerned with allowing the good in and preserving their goodness. To take things out of the abstract, we are preferring a method that: a) does a better job of filtering through justices who reason from more independent mental processes, and b) protects this independence by removing strategic considerations.

So, perhaps judges will always have a bit of bias and we may never be able to fully detect this bias in their reasoning, but we are aiming to pick the best of the bunch and produce an optimal set of circumstances that could remove any potential incentives to behave in such a strategic manner. A large concern I have with selection methods that encourage strategic decision-making is that they do not incentivize bottom-up decision-making with the ambition of formulating the best decision; instead, they allow judges to get lazy (for a lack of a better term). A judge who acts strategically doesn't have to defend his ideas as much as a judge who has no solidified base of support to appease. The former judge is far more capable of relying on confirming a bias and letting roars of support overshadow his opinion quality and argumentation rather than snuffing out the best reason to arrive at that confirmation of bias. This is not the sort of judge we would want in any case. One might object that this is an unreasonable claim because either way the judge will be evaluated in a holistic fashion and his constituents will want the strongest opinion possible; i.e. they will want someone who appeases them but delivers the strongest arguments possible in the process. However, I do not think this argument is a realistic one. I think it is rather uncontroversial to suggest that the general constituents of a judge (and the general populace for that matter) will care far more about rhetorically charged outcomes in the

short term rather than the long-term security of the opinions being decided. Consider the recent overturning of Roe v. Wade with Dobbs v. Jackson Women's Health Organization. Undoubtedly, the masses generally have strong opinions about the subject, but how many of them do you think actually took the time to read the Dobbs v. Jackson Women's Health Organization opinion?

8.2 Optimal Outcomes as Best Facilitated by Merit Selection

The point being made is that when judges act strategically/non-independently, they act with more considerations that are irrelevant to the nature of the arguments before them and decide from a basis of less rationality and more bias. And as the empirics reveal, this is not so much a theory as it is a fact of being an elected or appointed judge. Thus, merit selection comes in as the supreme method of judicial selection according to such criteria. For starters, merit selected justices are chosen by a nonpartisan selection committee. Once they get to the bench, the nature of yes-or-no retention elections paired with no partisan expectations makes these justices the ones most free from strategic considerations. All this makes merit selection the method of selection most conducive to choosing justices with independent decision-making processes and protecting these processes.

9 Defining a Healthy Democracy / Figuring Out Where the Judiciary Fits into a Healthy Democracy

Moving from the question of optimal outcomes to the question of a healthy democracy, I suggest that to promote a healthy democracy is to strengthen the nation’s institutional legitimacy and democratic values as a whole (i.e., to strengthen the legitimacy and democracy of the whole system itself rather than the legitimacy or democracy of a single institution within that system) and facilitate social progress while promoting personal freedoms and citizen involvement in government. It also requires ensuring that the voices of minorities are protected without

trampling over the general norm of majority rule. Similar to our discussion on the issues with free speech cases and general rules like the liberty principle, this surface level definition is decently uncontroversial. What is controversial however is what it actually takes to meet such criteria. As I set out what it takes to meet this criteria, I want to emphasize the focus on growing the democracy and institutional legitimacy of the nation as a whole and preventing a tyranny of the majority while preserving majority rule. This leads us into the primary question concerning the role of the U.S. judiciary in terms of contributing to a healthy democracy: does an undemocratic judiciary give us a more democratic nation? I will now lay out the arguments on both sides of this debate, and then deliver a verdict on the matter.

9.1 The Argument for a Non-Democratic Judiciary

Given that just about every single governmental institution in the United States functions on a principle of majoritarianism and the influence of public opinion, there is some legitimate concern that without an independent judiciary the U.S. fails to have sufficient checks against a tyranny of the majority.[52] From a procedural standpoint, the minority needs a platform where he can make

[52] To express the concern over a potential tyranny of the majority in one of its most original forms, I turn to the words of James Madison: "Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority". James Madison. “Federalist Papers No. 10 (1787).” Bill of Rights Institute. Bill of Rights Institute. Accessed October 1, 2022. https://billofrightsinstitute.org/primary-sources/federalist-no-10.; "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure". James Madison. “Federalist Papers No. 51 (1788).” Bill of Rights Institute. Bill of Rights Institute. Accessed October 1, 2022. https://billofrightsinstitute.org/primary-sources/federalist-no-51.; for further discussion on a major historical perspective on the potential for a tyranny of the majority within the United States, see also Alexis de. Tocqueville. *Democracy in America / Alexis de Tocqueville ; Edited by Eduardo Nolla ; Translated from the*

his case with equal footing.[53] The judiciary facilitates this leveling of voices so as to guarantee that those in the minority will have their arguments held to the same level of respect and critical examination as those in the majority.[54] This means that the majority will have to rely on sound argumentation to get their ideals imposed rather than relying on their sheer force in numbers. Such outcomes form the basis for the non-procedural arguments in support of a non-democratic judiciary. From the non-procedural standpoint, societal and democratic growth ensue when challenges are raised against popularly accepted positions. The judiciary forces us to stop and question public opinion so that we are valuing optimal outcomes in the form of good and sound ideas. Such serves a very Millian purpose of preventing dead-dogmas and letting the best arguments from the marketplace of ideas rise to the top.[55] In keeping with Millian fashion, this also forces citizens to listen to each other's perspective, facilitating civil discourse and respect for

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French by James T. Schleifer. Liberty Fund, 2012. Vol. 1. Part 2. Ch. 7, "Of the Omnipotence of the Majority in the United States and Its Effects". https://discovery.ebsco.com/linkprocessor/plink?id=ee0bd961-75d5-32d2-9fbd-a3889602379c.

[53] Though it is a bit of a non-traditional/informal piece of work, Rick Garlikov gives a solid review of the argument for why the minority needs a place to stand against the majority in a true democracy and what some of the mechanisms that can ensure this (both formally and informally) look like. See Rick Garlikov. "The Need for Formal and Informal Mechanisms to Prevent 'Tyranny of the Majority' in Any Democratic Government." http://www.garlikov.com/philosophy/majorityrule.htm.

[54] See Robert C. Hughes. "Judicial Democracy." *Loyola University Chicago Law Journal* 51, no. 1 (January 1, 2019): 19–64. https://discovery.ebsco.com/linkprocessor/plink?id=00c40e18-a2fb-3bd2-8c39-7926ca50e8ff.

[55] Samuel Freeman. "Constitutional Democracy and the Legitimacy of Judicial Review." *Law and Philosophy* 9, no. 4 (January 1, 1990): 344-346. https://discovery.ebsco.com/linkprocessor/plink?id=4b5d680e-efaa-3122-b74a-fddd7f4d7e2f.; For a clear and concise description on on judicial review, see Alvin. B Rubin. "Judicial Review in the United States." *Louisiana Law Review* 40 (October 15, 1979): 67–82. https://discovery.ebsco.com/linkprocessor/plink?id=2e5b8585-d890-3e8e-8166-740c639a0798.

those on the other side of the aisle (though these Millian ideas may be too ideal and only suitable in a perfect world; an issue to be taken up later).[56]

Thus, when we holistically evaluate the American system of government and its institutions, we should accept a non-democratic judiciary (to an extent) for the sake of a more overall democratic system since it procedurally and non-procedurally contributes to a greater and more healthy state of democracy. The non-democratic judiciary is a necessary evil in some sense; the end of greater systemic democracy justifies the means of a judiciary not held directly accountable to public opinion.

9.2 The Argument for a Democratic Judiciary

On the other hand, however, some argue that democracy is good insofar as it empowers individuals to make decisions, even if they are making the wrong decision. The argument suggests that the legitimacy of an institution or decision comes from the fact that its citizens have agreed upon it, and that we ought to assign greater value to a wrong decision that was made democratically rather than a better one which was enforced upon us. Jeremy Waldron furthers this argument by pointing out that one man's policy victory will always be another man's tyranny: "Defenders of abortion rights think the pro-life position would be tyrannical to women; but the pro-life people think the pro-choice position is tyrannical to another class of persons (fetuses are persons, on their account). Some think that affirmative action is tyrannical; others

[56] Ibid., p. 344-346.; Mill's general theory of free speech states that free speech ought to be protected in any society because the free exchange of speech in the infamous marketplace of ideas fosters societal progress, prevents dead dogmas (i.e. prevents us from forgetting the justification for our beliefs because they were never challenged), and facilitates civil discourse. John Stuart Mill. *On Liberty / John Stuart Mill*. Andrews UK, 2011. https://discovery.ebsco.com/linkprocessor/plink?id=4bc18baa-42c5-3d98-a3ec-80e4cc5c6dd9.

think the failure to implement affirmative action programs is tyrannical. And so on.”.[57] Thus, the question becomes: when we consider that either way there is a tyranny with every policy and law, which is more tyrannizing, a decision made by public officials who are held accountable to the masses, or a decision made by a select few hidden from the public eye and isolated from accountability?[58]

9.3 In Favor of a Non-Democratic Judiciary

9.3.1 The Sovereign Precommitment Argument

Samuel Freeman makes the case that democracy ought to be understood more so as a context and condition rather than a structure and a procedure, "as a form of sovereignty and not merely [as] a form of government".[59] This is to say that rather than viewing democracy purely in terms of a majoritarian structure and systematically majoritarian processes, democracy ought to be understood in terms of the positive and sovereign condition that is fostered for the individual within a given democratic society. Of course, structure and procedures matter, but the point being made is that there is a lot more to democracy than simple elections or majoritarian principles; i.e. the structures have to extend beyond simple majoritarianism. In his discussions concerning judicial review (which are very analogous to the question of a democratic or non-democratic judiciary)[60], Freeman contends that “judicial review can be seen as a kind of shared

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[57] Jeremy Waldron. “The Core of the Case against Judicial Review.” *Yale Law Journal* 115, no. 6 (April 1, 2006): 1395-1396. https://discovery.ebsco.com/linkprocessor/plink?id=cb1cbf69-2cfe-3206-918a-3272afd49466.

[58] Ibid., p. 1396.

[59] Freeman. “Constitutional Democracy and the Legitimacy of Judicial Review”, 329.

[60] Many sources used to evaluate the nature of whether we should prefer and independent judiciary or one in touch with majoritarian influence are on the topic of judicial review. Judicial review is essentially the power of the judiciary to determine whether actions from the executive and legislative are constitutional or not. Because the question of judicial review concerns whether the judiciary should have the power to override the majoritarian executive or legislative

precommitment by sovereign citizens to maintaining their equal status in the exercise of their political rights in ordinary legislative procedures".[61] Freeman argues that "if we see democracy not just as a form of government, but more basically as a form of sovereignty, then there is a way to conceive of judicial review as a legitimate democratic institution".[62] In his arguments, Freeman maintains that equal political rights are as crucial to democracy as the majoritarian factor is.[63]

The point on the importance of equal political rights is to be taken up later. However, I would like to discuss the idea of judicial review as a sovereign precommitment first. In its purest form, this is a Rawlsian social contract theory that is in keeping with the basic social contract ideas of other theorists such as John Locke and Jean-Jacques Rousseau. More specifically though, this argument corresponds to Rawls' theory of justice and the original position / veil of ignorance. The basic idea behind Rawls' original position and the veil of ignorance is that if we want to build the most acceptable and egalitarian system of government, we ought to draw up its principles from the hypothetical state of a citizen who knows nothing about their circumstance, attitudes, or given position in society.[64] Given your uncertainty of status and mutual-dependency on others, you would likely create a system of basic egalitarianism that has adequate protections for people of all backgrounds, conditions, and attitudes, including the political minorities.[65] An independent judiciary within the context of the American system seems like a very reasonable

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branch, the arguments surrounding judicial review are very analogous and useful to our discussions.

[61] Ibid., p. 327.

[62] Ibid., p. 327.

[63] Ibid., p. 328.

[64] John Rawls. *A Theory of Justice*. Revised. Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1999: 10-19.

[65] Ibid., p. 10-19.

sovereign precommitment that most citizens would make. Given the plurality emphasis that lies at the heart of every other U.S. institution, the check of an independent judiciary is something that any rational agent in the original position would agree upon.[66] Sure, sometimes the courts will overturn something the majority and I have agreed upon and I will vehemently disagree with their ruling. But this is a risk that I take and the ruling is one that I embrace because it is a sovereign precommitment which I agreed to in the chance that one day it's me who needs a hand in challenging the majority.

9.3.2 The Equal Political Rights Argument

I find this Rawlsian case made by Freeman to be a very convincing point. However, we need not rely on the nature of sovereign precommitments. If one is not convinced of such arguments, there is still much room for the claim that a non-democratic judiciary is structurally and procedurally democratic in ways that we can justify it without relying on the original position. This involves recognizing the importance of equal political rights in a democracy. I teased out some of this argument above in discussing how a non-democratic judiciary facilitates a leveling of voices so as to guarantee that those in the minority will have their arguments held to the same level of respect and critical examination as those in the majority. A basic structural principle of any democracy is that everybody starts with an equal voice and ability to influence decision-

[66] Surely, some would object to Rawls' theory and my application of it to say that this is an improper conclusion to make, since some people would be risk takers and design society to be extremely in-egalitarian. To take up these objections and respond is beyond the scope of this paper. Rawls' theory is not being presented as the end all be all justification for a non-majoritarian judiciary, it is merely present to accompany the ideas being presented and describe them in a familiar manner, as part of a larger argument. I will address more strong and specific objections to my argument down the line, so I would rather deal with those than get too bogged down in the veil of ignorance debate itself.

making.[67] If we are concerned with ensuring that citizens have their voices represented and are able to speak their minds, this requires providing a platform to ensure that even the most disenfranchised voices have the ability to speak. Without this platform for the minority, a system becomes democratic only with respect to those who fall in the majority. This does not mean that we have to incorporate the opinions of the minority into every decision. All that is being claimed is that we have to allow the minority a place to plead his case. An independent judiciary serves to ensure that all voices can be heard on a level playing field and protects a democracy for all rather than a democracy for the many. Thus, it is perfectly democratic in a procedural and structural sense to have a non-democratic judiciary because it provides structural assurance that all citizens have a place to voice their sentiments and remedies the potential undemocratic consequences that can arise from having a purely majoritarian system.

To emphasize a point that was just alluded to, I think that when we have these discussions it is important to remember that when the minority brings a charge against the majority in the courts, he is not guaranteed an automatic victory; all that he is guaranteed is a level playing field where his voice can be heard. Sometimes we take this for granted when we start talking about a potentially tyranny of the minority. This point lies at the core of a rebuttal to Waldron who makes the strongest case for a democratic judiciary by suggesting that a decision made by the few (and for the few we might add for our purposes) may be more tyrannizing than a decision made by the many.[68] If we would like, we can consider the minority as simply asking/forcing the majority to explain themselves rather than stepping in and imposing their will.

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[67] Naturally, some will develop their abilities to influence decision-making, and some will lose it, but the question we are concerned with regards systematically setting things up so that either of these characters can step into the judiciary and speak with an equal voice.

[68] See footnote 58.

If the majority cannot defend their positions against the minority, it would be more tyrannizing to maintain the majority's will and subject the minority to an inferior argument than it would be to reverse things in favor of the minority.

All this is the very reason that we ought to prefer having a non-democratic judiciary as opposed to a democratic one. With a non-democratic judiciary in place, we can elevate the voices of the minority onto equal footing (procedurally) and facilitate as well as reap the benefits of Millian discourse (non-procedurally). Doing so allows us to create the conditions necessary for an overall healthy and properly functioning democracy.

10 Applying our Conception of Where the Judiciary Fits into a Healthy Democracy

10.1 Where This Conception Lands Us on the Zero-Sum-esque Scale

By defining democracy as demanding protections for the minority from the majority, we have once again set ourselves up to favor a selection method that lends itself to independence over popular accountability. It is rather straightforward why independence is important to a non-democratic judiciary; it makes sure that we have judges who are ruling from a basis separate from popular accountability. If we allow popular wills to interfere with the decision-making processes of justices, then the judiciary turns into another majoritarian institution. To what degree depends on the method of selection and what retention looks like for these justices. If we hold partisan elections every cycle, then the judiciary becomes extremely majoritarian because judges are forced to always be acting strategically (catering to the demands of the electorate and their constituency in particular). If we focus on retention elections of the yes-or-no fashion however, there is an element of the popular will involved, but it is directed far more at the whole electorate rather than a targeted constituency, meaning judges don’t have to act nearly as

strategically. Recall that with retention elections of the yes-or-no fashion it is very rare for the incumbent to lose, and this method of retention is most closely associated with merit selection. Even if a judge who was expected to be nonpartisan (and depended on retention through such yes-or-no elections) wanted to act strategically, it would be better for them not to pander to one partisan base and risk disenfranchising the other. This goes back to the idea that for a nonpartisan judge, losses on one side of the aisle are gains on the other. For the merit or nonpartisan elected justice seeking retention, even if he wants to act strategically his best bet is to not become guided by partisanship. I am skeptical that this is true for the latter justice, but that is an issue to be taken up shortly.

10.2 A Healthy Democracy as Best Facilitated by Merit Selection

And so, as we get more independent and move away from popular accountability, we thus get a better method of judicial selection. With this, we have an ordering that is not at odds with our method of ordering for quality, since both prefer the pole of independence. Thus, by our definitions of both optimal outcomes and a healthy democracy, merit selection comes out on top, with partisan elections at the bottom, and nonpartisan elections in between.

11 Objection A: Rejecting the Definition I Have Put Forth of an Optimal Outcome

I would now like to now address some of the strongest objections against the ordering which I have put forth (and the groundwork which sets up this ordering).

11.1 Framing the Basic Objection

One might contend that the definition I have laid out for what an optimal outcome is happens to be a bit of a cop out; that I have circumvented the issue of defining an optimal outcome rather

than trying to actually define it. Admittedly, my definition may not pin down *rightness* in a way that satisfies us entirely. However, I have attempted to give the most solidified definition of an optimal outcome that is both action guiding and leaves us little room for arbitrariness. I will not revisit the issues associated with trying to pin down rightness as I have already spelled them out thoroughly above, but any version of a more specific definition I could put forth would have to leave an abundance of arbitrariness (like the liberty principle) to accommodate the many different perspectives of rightness, and do little for us in telling us what to look for in a judge. And so, I aimed for a definition that was straightforward and action guiding, as well as one that could be agreed upon by those on any side of a debate.

Let us try to elevate this counterargument though. Let us take issue with the very definition of an optimal outcome that we have provided by arguing against an emphasis on rational and bottom-up decision making. In the shoes of an objector, we will do so by showing how judges may not be the poster children for sound decision making and are as susceptible to irrelevant influences as the masses. If such is the case, then perhaps we ought to turn the power back into the hands of the people, or maybe instead focus on more important and realistic considerations such as ensuring ideological diversity (to be spelled out below).

11.2 Elevating the Objection and Proposing an Alternate Way to Arrive at Optimal Outcomes

Sometimes judges get things *right*, and sometimes they get them *wrong*. If that's the case, why not put the power to be right and wrong in the hands of the people? Perhaps, we can argue that judges are more capable of getting to the right answer than the general populace and less fallible, but this may not be a very promising way to go. It was Justice Jerome Frank who said that

"justice is 'what the judge ate for breakfast'".[69] The general idea of this trope is that though "We'd love to believe that a judge's rulings are solely based on rational decisions and written laws. In reality, they can be influenced by irrelevant things like their moods and, as Frank suggested, their breakfasts".[70] The empirical research of Shai Danziger and peers confirms that Justice Frank was generally correct in his sentiment. Danziger and peers find that the probability of a favorable ruling towards a prisoner starts at around 65% at the beginning of a session and "steadily declines from ≈0.65 to nearly zero and jumps back up to ≈0.65 after a break for a meal", suggesting that "judicial rulings can be swayed by extraneous variables that should have no bearing on legal decisions".[71] Thus, no matter how independent the method of judicial selection used, the fallibility of a judge may be no more enlightened than that of the general populace. Of course, this is not advocating for the allowance of citizens to vote directly on legal decisions because there is still much to be said about the legal knowledge a judge possesses compared to the general public. However, it makes it clear that judges can never be the ideal agent of rationality, and perhaps we should relax our expectations to aim for something more realistic than hypothetical neutrality.

Cass Sunstein and peers provide support for the idea that ensuring ideological diversity on the bench may be this more realistic and plausible aim. Sunstein and peers come to general conclusion that judges do indeed vote along ideological lines, but this effect is dampened when

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[69] Ed Yong. "Justice Is Served, but More so after Lunch: How Food-Breaks Sway the Decisions of Judges." National Geographic Science. National Geographic, May 4, 2021. https://www.nationalgeographic.com/science/article/justice-is-served-but-more-so-after-lunch-how-food-breaks-sway-the-decisions-of-judges.

[70] Ibid.

[71] Shai Danziger, Jonathan Levav, Liora Avnaim-Pesso, and Daniel Kahneman. "Extraneous Factors in Judicial Decisions." *Proceedings of the National Academy of Sciences of the United States of America* 108, no. 17 (April 26, 2011): 6889–90. https://discovery.ebsco.com/linkprocessor/plink?id=b664b21a-20ae-3c9d-88ee-b6a44ad863db.

judges with opposing ideologies are sat on the same bench, and amplified when judges of the same ideology are sat on the same bench; they refer to these three principles as ideological voting, ideological dampening, and ideological amplification, respectively.[72] Recall that our preference for independent judges comes from the position that judges with independent decision-making processes and less strategic considerations are most likely to value reason and sound argumentation, and so judges who practice from an independent position would be those most enabled to produce optimal outcomes. However, when something as simple as a lunch break can influence a judge's decision-making processes, it seems far-fetched to suggest that these same judges can fully relinquish the political biases they possess so as to have a perfectly bottom-up reasoning approach and act with utter rationality. If this is the case, it seems like we ought to allow for elections and advocate for a diversity of ideologies on the bench rather than trying to pretend like we can use a selection method to sniff out judges with perfect reasoning capabilities. We would be pitting bias against bias and acknowledging the fallibility of judges when we directly incorporate the voices of citizens. In essence, we would have a judicial system that institutes checks on a departure from reasoning and keeps judges from running with their biases by forcing them to reconcile their beliefs and opinions with diverging peers, as opposed to a system where we put some judges in place and simply trust in their rational facilities in an unchecked manner because of the method they were chosen from and their impending retention method. The former seems like a much more reasonable and attainable ambition than searching for chimeras and trying to convince ourselves that perfectly rational judges do exist.

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[72] Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki. *Are Judges Political? : An Empirical Analysis of the Federal Judiciary*. Brookings Institution Press, 2006: 8-9, 149-50. https://discovery.ebsco.com/linkprocessor/plink?id=06535aec-5d1c-3d7c-8f16-622c16a75b1e.

11.3 Where the Alternative Method Lands Us on the Zero-sum-esque Scale and a Preferred Method

If we accept such an argument, the ordering of our selection methods from best to worst flips. The best selection method would reside at the pole of accountability (assuming there is also an emphasis on ensuring ideological diversity) and as we move towards "independence" (quotations added for the skeptic who thinks the sort of independence we're shooting for is unattainable) we would get worse methods of judicial selection. Thus, we would favor partisan elections that emphasize political diversity on the bench because they recognize biases and bring them to the forefront rather than ignoring them, and we would rank merit selection at the bottom of our list because it does the exact opposite. Nonpartisan elections would again be in between because they would borrow an element from each and have some level of popular accountability which forces them to act strategically, but they would be doing so in the supposed name of neutrality.

12 Objection B: Your Millian Ideals are Just That: Ideals

Before responding to objection A, I would first like to lay out objection B. Objections A and B pair quite nicely with each other, so it is best to place them in cohesion for the strongest line of reasoning and then respond to the two objections simultaneously.

Another charge may be lodged against our position by attacking the Millian ideals that we have used to justify a non-democratic judiciary, and with it our pursuit of an independent judiciary. Perhaps the Millian ideals we have laid out in previous sections only work in a society with the effective preconditions for such ideals to flourish. In a perfect(ish) world, a minority raises a challenge to the majority and a battle in the courts ensues where both sides actively listen to each other, and the marketplace of ideas stirs up right before an independent judge who synthesizes the best set of arguments. Dead-dogmas are prevented, and everybody walks out of

the courtroom holding hands as more informed citizens. Needless to say, this is a fantastical depiction of things. In reality, the current United States is deeply polarized over politics and has a pretty broken state of discourse. The Listen First Project has compiled a set of data that demonstrates such; the project puts forth the following data to demonstrate that "We don't know those we hate":

- "**77%** have few or no (**41%**) friends from the other side. (Pew).
- **71%** say they have avoided talking about politics with someone whose political views are opposed to their own in the last twelve months. (Ipsos)
- **60%** now live in 'landslide counties' where the Democratic or Republican presidential candidate wins by 20+ points. (New York Times)
- **85%** say those who voted for the other presidential candidate don't understand people like them. (Pew)
- **80%** of Democrats think the Republican party is controlled by racists. (PRII)
- **82%** of Republicans think the Democratic party has been taken over by socialists. (PRII)".[73]

This means that when a decision is being wrestled over in a high court, people aren't genuinely listening to the opposition and refining their own beliefs. Instead, they are criticizing the opposition without listening to their case, or even listening to the arguments of those on the other side and forming their own position by standing in opposition to whatever is being said; i.e. my theory is whatever yours isn't. And so, while the Millian ideas may sound great, they mean little if the effective preconditions for them are not in place. What does seem more realistic and

[73] "Toxic Polarization: The Latest Numbers." Listen First Project. Accessed October 3, 2022. https://www.listenfirstproject.org/toxic-polarization-data.

perhaps even more Millian may be the solution advocated for above that involves putting politically diverse judges together on the same bench. Rather than placing our faith in judges selected by a certain commission and trusting them to behave independently, why not input active checks so that even if judges want to act strategically, they are constrained and have limitations to their behavior. In very Millian fashion, this would look like different partisan judges representing different partisan interests and duking things out on the bench, a more realistic and legitimate marketplace of ideas.

13 Rebuttal to Objections A and B

13.1 Ideals of Independence and Rationality are Very Important for a Properly Functioning Judiciary

Perhaps a judge is influenced by what he eats for breakfast. This is certainly a potential concern we may have about justice and the judiciary, but it is one that applies to the judiciary as a whole and should not be used to dampen our arguments for or against a certain method of judicial selection. Perhaps we must work on eradicating irrelevant influences that factor into the behavior of judges in light of such revelations, but this cannot and should not be done by pitting judges against each other on the bench. 7 hungry judges are 7 hungry judges no matter how they got to the bench, and I don't think forcing hungry judges to duke it out makes them any more rational. This seems like a rather strange discussion to be having, but I think it is a very necessary one and its simplicity helps to make a point: the general rationality of judges and the role of irrelevant influences may be of concern, but it is a concern that can be applied to you, me, the deciding electorate, and any judge chosen by any method of judicial selection; so it is not an issue exclusively for the merit selected justice. However, it is true that we have arrived at merit selected judges as the best judges particularly because we care about rationality and casting aside

bias. And so, we are certainly due for a discussion on concerns surrounding biases and rationality in decision making. But, we are due for one that looks at an area where there is room for significant differences between selection methods, such as those involving strategic decision-making and the case for ideological diversity on the bench as it applies to such.

To lose our aspirations of an independent judiciary would outright damn the nation and everything our democracy is founded upon; the very nature of checks and balances would go up in smoke. To do so would be to effectively institute a second legislative branch. This is the primary reason that the case for an ideologically diverse and admittedly biased bench is a horrible solution. Judicial review is just one instantiation of a power belonging to the judiciary that can be used to check the powers of both the majoritarian based legislative and executive branches.[74] It is a principal power that is essential to democracy because it keeps either branch from getting too swept away by popular demands. To let partisan forces duke it out on the bench would effectively set our institutions up for a majoritarian race to the bottom where polarization and partisanship run rampant in an unfettered fashion. If it's compromise and middle ground we're seeking, the current legislature is no model for us to build our judiciary around. Ideally, we should be seeing bills produced that are the result of hands extending across the aisle in good faith. However, the current legislative trend (at least more so now than ever in recent times) is to uncompromisingly wait until one's party has the majority and then impose a will of the constituents; to stubbornly refuse ideological dampening. If we allow such tendencies to creep into the judiciary, then it would just be another weapon of the legislature to bargain with and against (even far more than it already is).

[74] See footnote 60 for a summary definition of judicial review.

Undoubtedly, there is a level of politics and partisanship involved in the judiciary, I am not denying this. I am merely claiming that we should not be content with allowing this level of politics to surge and become more than something minimal and constrained; i.e. we should not be so quick to concede independence in the judiciary and welcome polarization and partisanship as the new judicial norm. Perhaps people are not listening to each other and John Stuart Mill is turning in his grave. However, we should work to remedy these concerns in all aspects of our democracy—including the judiciary—rather than give up on our principles and permit a polarized and partisan race to the bottom. One might object here that I am imposing a bit of a double standard. Recall that I am aiming to prescribe the best method of judicial selection for today's political landscape. With this in mind, one might contend that the idea of pitting judges against each other is the optimal solution for today's political landscape and so I ought to accept it. However, I stand firm on the position that even in today's political landscape I would rather have independent judges and cling to Millian ideals (perhaps even falsely) than allow a majoritarian race to the bottom. The case for ideological dampening by instituting a second legislature (to put it crudely) can hardly be considered a legitimate prescription for the judiciary. Sure, we are aiming to come up with a suggested selection method for today's America, but setting ourselves up for failure as a nation can hardly be considered a legitimate suggestion.

13.2 The Importance of Narratives Regardless of Reality - Perceptions of Legitimacy

Another reason to resist the influence of partisan based popular politics in the judiciary is the importance of narratives. At this point, I would like to reintroduce the empirical category of judicial legitimacy. We sort of tabled these empirics surrounding citizen perceptions of the judiciary, but we are now ready to use them for the sake of rebutting objections 1 and 2. I

contend that even if the narratives are false, they are still very important to our considerations. Regardless of the hypothetical case one could make for partisan elections as actually fostering in a more independent judiciary, at the end of the day our empirics show that displays of partisanship in the judiciary tend to have a net negative effect on citizen perceptions of legitimacy. Recall that when judicial elections are held, perceptions of institutional legitimacy immediately benefit by dint of the presence of elections and perceptions of increased accountability. However, once the elections get toxic or citizens get more exposed to the political nature of the election, institutional legitimacy suffers and these negative effects can outweigh the positive effects in the aggregate scheme of things. As Gibson noted, sometimes all it can take is the mere presence of campaign ads.[75]

Given the statistics above concerning polarization and the current broken state of discourse in America, as well as the increased visceral nature of modern campaign ads, I do not think partisan judicial elections are any less political today than they were circa 2000 when the bulk of our empirical data was giving us the conclusions it did. In fact, they are very likely more toxic in modern times. There is little empirical data to defend the claim that judicial campaign rhetoric has gotten more toxic in recent times, but there is still good reason to believe that not only are campaigns more rhetorically charged now, they are also more aggressively presented to citizens. Interestingly enough, this is partially because of political strategy in which the Democrats are fueling the ads of far-right Republicans in the primaries to put potentially weaker candidates up against their Democratic candidates in the general elections.[76] When the "Polls

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[75] See footnote 27.

[76] Noah Caldwell, Ari Shapiro, and Justine Kenin. “Democrats Are Bankrolling Ads Promoting Fringe Republican Candidates. Here's Why.” NPR. NPR, June 27, 2022. https://www.npr.org/2022/06/27/1106859552/primary-illinois-colorado-republican-candidate-democrats-ads.

show that a clear majority of Republicans believe Joe Biden was illegitimately elected in 2020" this may not be such a wise strategy for the Democrats and it is likely just setting us up for some of the most toxic general elections in recent times.[77] Granted, much of the focus with the Democrats concerning this strategy is on congressional seats, but it would be very unreasonable to think that these tactics or even messier ones are not applied in modern judicial elections. Thus, though it requires a bit of extrapolating, when ads like those encouraging citizens to join an armed candidate in "RINO Hunting"[78] are being promulgated for congressional races, I think we are in a position to say that judicial legitimacy is suffering when partisan elections are hosted.[79] Clearly, this harms the case for partisan elections and a popular judiciary by demonstrating how regardless of performance, perceptions of legitimacy can suffer under them. However, it also shows just how unreasonable it is to suggest that pitting partisan judges against each other and hoping for ideological dampening is the solution.

14 Objection C: What About Nonpartisan Elections?

One may seek to salvage some level of popular accountability by advocating for nonpartisan elections. The case may take form as such: the empirics surrounding nonpartisan elections demonstrate that they do not behave like partisan elections and they manage to strike an optimal balance between independence and accountability. This is an argument that initially seems promising; a nice meeting in the middle of accountability and independence. A primary reason I

[77] Ibid.

[78] I should note that though I am using the example of far-right candidates to make my point, Democrats are not exactly the posterchildren for achieving civil discourse in their campaign ads or in terms of the political tactics they use (as the latter is demonstrated by their funding of far-right ads).

[79] Alan Feuer. “In Ad, Shotgun-Toting Greitens Asks Voters to Go ‘RINO Hunting.’” The New York Times. The New York Times, June 20, 2022. https://www.nytimes.com/2022/06/20/us/politics/eric-greitens-rino-ad.html.

think this argument could have some ground to it is that at the federal level, all judges are appointed. So, if we allow for some level of democracy and accountability within the state judiciary while still maintaining the independence that comes with nonpartisanship, we can feel a little comfortable taking this risk knowing that there is a line of appointed judges all the way above these nonpartisan elected judges who can check the rulings of their state courts. Again, we are still very much so emphasizing independence, so this is not opening us up to suggest that we ought to just have partisan judges at the state level and appointed judges at the federal level. In essence, this argument suggests that we are still trying to maintain independence at the end of the day, but we ought to feel comfortable experimenting with a minimal risk alternative that allows us to try and input *some* type of accountability for the sake of achieving a boost in judicial legitimacy.

15 Rebuttal to Objection C: Nonpartisan Elections are Probably not so Nonpartisan These Days

Again though, I think we can look at the data and anecdotes above to demonstrate that nonpartisan elections may not be so nonpartisan anymore. To bolster this theory, consider that Citizens United v. Federal Election Commission was decided in 2010 and Republican Party of Minnesota v. White in 2002. The former case declared that money is tied to speech and the First Amendment prohibits governmental restrictions on campaign expenditures that come from external sources (i.e. business interests, labor unions, etc.).[80] The latter declared that barring judges from stating their positions on certain topics and how they might rule on certain cases is a

[80] Citizens United v. FEC, 558 U.S. 310 (2010). https://supreme.justia.com/cases/federal/us/558/310/.

violation of a judicial candidate's First Amendment right and cannot be permitted.[81] It is no surprise then that given such rulings, the 2019-2020 judicial elections cycle "set an overall national spending record of $97 million, 17 percent higher than the previous record set in 2004 (adjusted for inflation)".[82] Thus, we have a deadly combination of more toxicity and more overall funding of that toxicity. Charles Geyh suggests that even if we replaced these privately funded races with publicly funded ones, they would still be just as toxic given the low barriers to entry and impending increase in competition.[83] Geyh also suggests that the increased competition that results from public funding could foster a lack of independence by turning each election cycle into "referenda on the popularity of incumbent judges' isolated decisions".[84]

All this combined should make anyone very skeptical of just how nonpartisan nonpartisan elections actually are these days. As mentioned, I think the argument for nonpartisan elections has some promising elements. If judges are actually able to maintain their nonpartisan stance and avoid getting sucked into the nastiness of politics and partisanship, then it seems like nonpartisan elections may actually be a nice middle ground selection method that we can consider as a potential contender against merit selection. The losses on one side of the aisle being gains on the other side of the aisle sounds great theoretically and would foster the independence that we care about, while allowing us to capture the benefits of legitimacy that come from a perceived increase in accountability. There is some room for such a claim, and it is bolstered if

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[81] Republican Party of Minnesota v. White, 536 U.S. 765 (2002). https://supreme.justia.com/cases/federal/us/536/765/.

[82] Keith, Douglas, and Eric Velasco. "The Politics of Judicial Elections, 2019-20." Brennan Center for Justice, January 13, 2022. https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2019-20.

[83] Charles G. Geyh. "Publicly Financed Judicial Elections: An Overview." *Loyola of Los Angeles Law Review* 34, no. 4 (June 1, 2001): 1480. https://discovery.ebsco.com/linkprocessor/plink?id=7211fcbf-c9e8-3649-b0ed-2b2dab18994b.

[84] Ibid., p. 1480.

retention elections (of the yes-or-no style) are held, rather than a nonpartisan election each cycle. Though it is a hard case to make right now, I think it is a very possible and not so difficult one to make if we can ground ourselves in solid empirics which show that nonpartisan elections can maintain their nonpartisan integrity in today's political environment. As it stands right now though, nonpartisan elections appear to be just as weak as partisan elections, or at best a few degrees better. And so, merit selection remains the preferred method of judicial selection.

16 Conclusion

16.1 Recapping

In this paper I have shown that given the current political landscape that exists within the American system of government, merit selection is the best form of judicial selection as opposed to appointments, nonpartisan elections, or partisan elections. To reach this conclusion I took stock of the recent empirical data surrounding each selection method with regards to five main criteria: productivity, quality, independence, perceptions of legitimacy, and diversity. The empirics surrounding productivity and quality were too controversial to be extrapolated from, but independence, perceptions of legitimacy, and diversity returned confident conclusions. No significant differences were found between the methods of judicial selection in terms of favoring or disfavoring minorities, but merit selection was shown to rank highest in terms of independence and perceptions of legitimacy.

After the empirical trends were laid out, I then turned to a philosophical discussion that attached normativity to these trends and probed to inquire which trends and their respective selection method would give us a) optimal outcomes, and b) a healthy democracy. I first argued that in many cases the optimal outcome cannot be precisely pinned down to a singular right answer because either the right answer is too complex for us to properly track down, or it relies

on picking between two points that fall on opposing sides of a zero-sum scale. Thus, because of this, I suggested that we ought to prefer a procedural definition of optimal outcomes. This procedural definition relied on bottom-up reasoning rooted in the ability to have independent decision-making processes that are free from the influence of strategic considerations. I then argued that in a predominately majoritarian system like the U.S., we should prefer a judiciary that is undemocratic in itself and independent from rather than accountable to majoritarian opinion because it is more democratic in the grand scheme of things (for the overall system). Like optimal outcomes, this too led us towards a preference for merit selection because it was the selection method most free from majoritarian influence. I also handled some objections to my preference for merit selection and showed that though elections could have some beneficial effect on democracy through increased legitimacy, their political nature tends to actually decrease aggerate and overall legitimacy.

16.2 Weaknesses of the Paper

There are some weaknesses that exist within this paper that I would like to make note of; both of which are related to the empirics. In describing the empirics and levels of differences that exist between different selection methods with respect to a given indicator, I had to rely on terms such as: least, most, more likely, etc. Pinning down actual numerical differences was difficult to do given the cloudiness that comes with empirical data. When I attempted to go in and calculate palatable numbers by working backwards from the coefficients through the regression formulas and towards a hard number or percentage, my efforts were often futile. And so, I did my best to snuff out true/significant differences versus minuscule ones that did not even merit recognition as a difference. I ended up sticking to the broader terms of comparison mentioned above for the sake of clarity in laying out the trends that exist.

I also relied only on a single source to describe some of the empirical criteria. The chief reasoning for this was that it was either the only source, the most summative source, or the canonical source. Because of the earlier mentioned issues that come with defining a selection method or choosing indicators for a given category of criteria, it was hard to find consistent sources that could be used comparatively for our purposes. It was also the case that some sources were the ones that everyone else cited for their own research. That is to say, everyone piggybacked off of some sources and held them to be canonical, or everyone piggybacked off of someone who's only competitor in the subject was his or herself (i.e. the field was dominated by several of their works).

16.3 For Future Research

For future research, I would like to see remedies to some of the other issues with the empirics that were mentioned earlier. The big two are capturing productivity and quality in a stronger fashion, and figuring out just how nonpartisan nonpartisan elections actually are these days. In terms of the former, this would require a more holistic set of indicators that factors in things such as rate of GVR order usage and the quality of unpublished opinions (respectively). The latter is more so just a matter of updating our empirics. As time moves forward and more recent data becomes available, it will be of interest to see if nonpartisan elections are actually as politically toxic as we hypothesize them to be these days. If they are not, there may be a case to be made that nonpartisan elections can boost judicial legitimacy without undermining judicial independence (to an extent).

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